IN THE SUPREME COURT OF THE UNITED STATES

No. 17-1606

RICKY LEE SMITH, PETITIONER

v.

NANCY A. BERRYHILL,
ACTING COMMISSIONER OF SOCIAL SECURITY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION OF THE RESPONDENT FOR DIVIDED ORAL ARGUMENT

Pursuant to Rules 21 and 28.4 of the Rules of this Court, the Solicitor General, on behalf of the Acting Commissioner of Social Security, respectfully moves for divided argument in this case. This case presents the question whether a decision of the Social Security Administration (SSA) Appeals Council dismissing as untimely a request for review of a decision issued by an Administrative Law Judge (ALJ) after a hearing is a "final decision of the Commissioner of Social Security made after a hearing" that is subject to judicial review under 42 U.S.C. 405(g). The

government requests that petitioner and the government each be allotted 15 minutes of argument time and that the appointed amicus curiae be allotted 30 minutes of argument time. Counsel for petitioner does not object to this request.

Petitioner filed an application for supplemental-security-income benefits under the Social Security Act on the basis of disability. After a hearing, an ALJ issued a decision denying his claim for benefits. The Appeals Council subsequently issued an order dismissing his appeal as untimely, finding that his appeal request had not been filed within 60 days, as required by 20 C.F.R. 416.1468(a). Petitioner then filed an action in federal district court seeking judicial review of the Appeals Council's order. The district court granted the Acting Commissioner's motion to dismiss the complaint on the ground that the Appeals Council's order was not a "final decision * * * made after a hearing," as required by 42 U.S.C. 405(g) for judicial review. The court of appeals affirmed, relying partly on an SSA regulation providing that "[t]he dismissal of a request for Appeals Council review is binding and not subject to further review." 20 C.F.R. 416.1472. Petitioner has an obvious interest in being able to proceed with his challenge to the lower courts' dismissal of his claim seeking judicial review of SSA's denial of his claim for disability benefits.

The Acting Commissioner of Social Security is the other party, and she is a party in all district court proceedings challenging

an Appeals Council order dismissing a request for review as untimely. Although the government agrees with petitioner, after further review of the question, that Section 405(g) authorizes judicial review in his case because the Appeals Council's dismissal order was a final decision after a hearing, the government has a substantial interest in the proper application of Section 405(g). Section 405(g) governs the availability of judicial review in all cases arising from the agency's denial of a claim for benefits. In Fiscal Year 2017, the Appeals Council dismissed approximately 2500 requests for review as untimely. See Resp. Br. 43 n.17. The government is also well positioned to address the impact of SSA's regulations on the availability of judicial review under Section 405.

The government's participation in oral argument in this case is warranted for the additional reason that petitioner and the government have a material disagreement about the scope of judicial review that Section 405(g) authorizes. Petitioner contends that, following the Appeals Council's dismissal order, the district court was permitted to review his ultimate entitlement to disability benefits if the court disagreed with SSA's timeliness conclusion, see Pet. Br. 24-25, whereas the government contends that judicial review was limited only to the timeliness ground that was the basis for the agency's decision, see Resp. Br. 29-30. That question is the subject of its own conflict among the courts

of appeals. See id. at 30. Division of argument will therefore materially assist the Court in its consideration of this case.

For the foregoing reasons, the government requests that the Court grant the motion for divided argument.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

FEBRUARY 2019